GUYETTE & COMPANY
LAW BRIEF PRINTERS
TULSA - OKLAHOMA

FILE COPY

OCT 21 1930

No. 69

In the Supreme Court of the United States

October Term, 1930.

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, *Petitioner,*

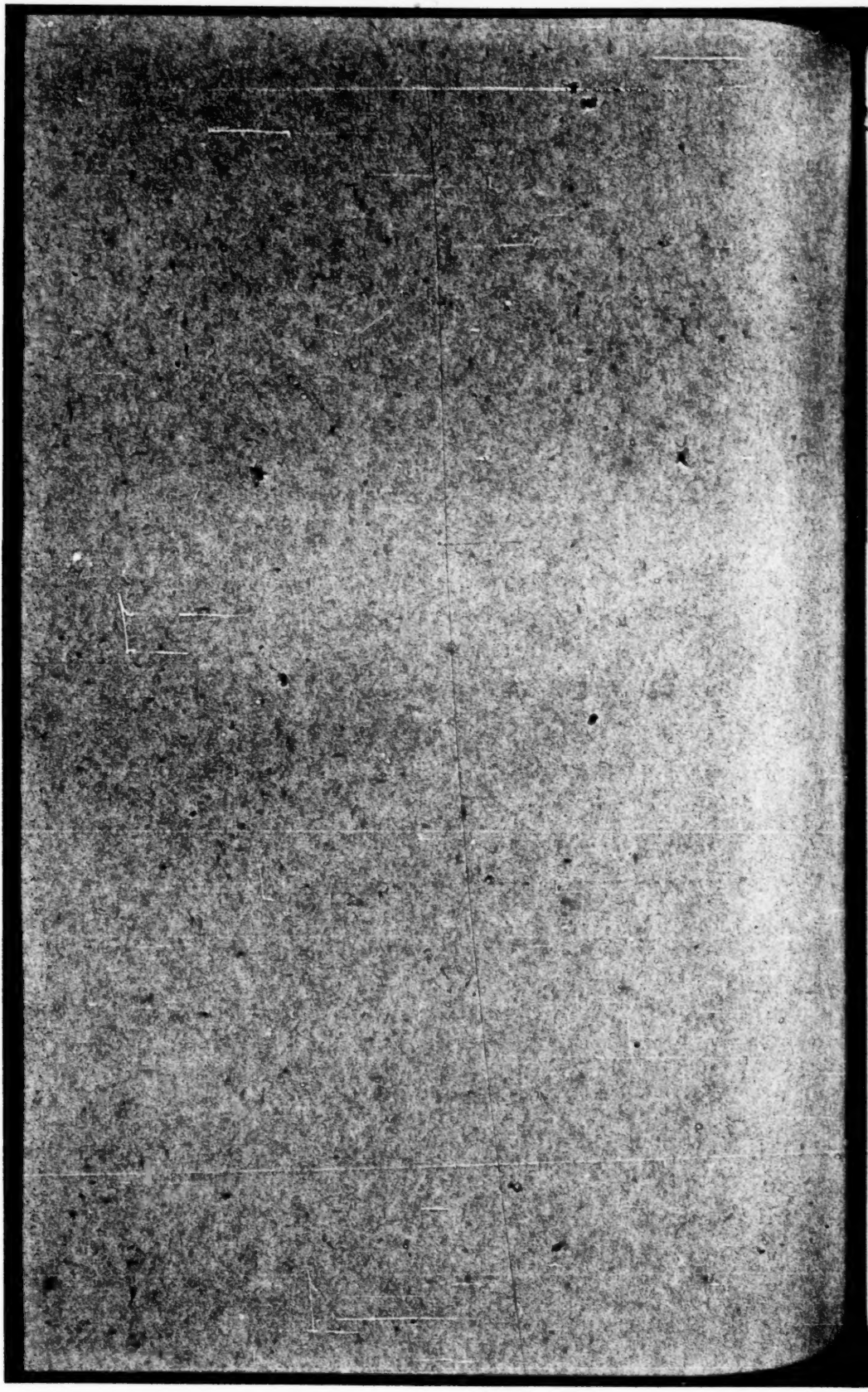
vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF FOR PETITIONER.

JAMES H. MAXEY,
Counsel for Petitioner.

L. E. CAHILL,
W. LEO AUSTIN,
Of Counsel.



INDEX.

	PAGE
Opinions of the courts below	2
Jurisdiction	2
Statement of the case	2
Specification of errors	3
Argument	4
The assessment-only waiver of February 5, 1921, related only to income taxes and did not extend the statutory period for collection thereof	4
A waiver given after the expiration of the statutory period for assessment and collection is invalid	17
Conclusion	23
Appendix:	
Revenue Act of 1913, Sec. E (1)	25
Revenue Act of 1916, Sec. 9-a	25
Revenue Act of 1917, Sec. 14-a	25
Revenue Act of 1918, Sec. 250-d	25
Revenue Act of 1921, (42 Stats. 265-266) Sec. 250-d	25
Revenue Act of 1924, (43 Stats. 299-300) Secs. 277-a-2, 278 (c), (d), (e)	26
Revenue Act of 1926, (44 Stats. 58-59) Secs. 277 (a), 1106 (a)	27
Revenue Act of 1928, Sec. 276-b	28

AUTHORITIES.

	PAGES
Act of Sept. 8, 1916	15, *et seq.*
Act of Oct. 3, 1917	3, *et seq.*
Act of Nov. 23, 1921	5, *et seq.*
Act of Feb. 13, 1925 (U. S. Code, title 28, Sec. 247)	2, *et seq.*

AUTHORITIES—CONTINUED.

PAGES

Anthony v. *Jasper County*, 101 U. S. 693..... 7

Benjamin Russell case, 278 U. S. 181..... 14

Bennecke v. *Insurance Company*, 105 U. S. 355.....7, 11

Bowers, Collector, v. *New York and Albany Lighterage Company*, 273 U. S. 346.....9, 13, 14

Coler v. *Cleburne*, 131 U. S. 162..... 7

Columbian Iron Works v. *Lee Brock, Collector*, (U. S. District Court for the Middle District of Tennessee, September 28, 1929)..... 18

Chas. H. Stange v. *The United States*, decided November 4, 1929..... 17

De Arnand v. *United States*, 151 U. S. 488..... 7

Florsheim Brothers Dry Goods Company, Ltd., et al., v. *The United States*, 280 U. S. 453..... 16

Graylock Mills v. *The Commissioner*, 31 Fed. (2d) 655 (Circuit Court of Appeals, Second Circuit).....18, 22

Hunter v. *United States*, 5 Peters 173..... 7

Joy Floral Company v. *Commissioner*, 29 Fed. (2d) 865.....6, 16, 17, 22

Mimeograph 3085..... 8, 13, 17

Pence v. *Langdon*, 99 U. S. 578.....7, 11

Pictorial Printing Company v. *The Commissioner*, 38 Fed. (2d) 563.....18, 19, 22

Pierce v. *United States*, 7 Wall. 666..... 7

Spear & Company v. *Heiner*, 34 Fed. (2d) 795..... 18

Toxaway Mills v. *United States*, 61 Ct. Cl. 363.....7, 11

United States v. *Updike, et al.*, 281 U. S. 489..... 8

Walsh v. *Price*, 34 Fed. (2d) 57..... 18

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1930.

No. 69

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, *Petitioner,*

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF *for* PETITIONER.

May It Please the Court:

This is an appeal granted by this court from a decision of the Circuit Court of Appeals for the Eighth Circuit holding that the amount of certain income and excess profits taxes for the year 1917 was not barred of collection. Copies of the sections of the Revenue Acts involved in this appeal may be found in the appendix of this brief.

Opinions of the Courts Below.

The opinion of the United States Board of Tax Appeals is reported in 10 B. T. A. 553, and is a part of the record on this appeal (R. 46-50). The decision of the Circuit Court of Appeals for the Eighth Circuit was rendered on October 25, 1929, and is reported in 35 Fed. (2) 620. It is a part of the record on this appeal (R. 71-79).

Jurisdiction.

This court has heretofore granted a writ of *certiorari* under Sec. 240 (a) of the Judicial Code, as amended by the Act of Congress of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

The date of the decree of the Circuit Court of Appeals is October 28, 1929 (R. 79). A petition for rehearing was denied on January 9, 1930 (R. 80). The petition for writ of *certiorari* was filed on March 31, 1930, and was granted on May 5, 1930 (R. 81-82).

This is an action filed in the United States Board of Tax Appeals by the petitioner against the Commissioner of Internal Revenue for a review of his determination of the amount of Income and War-Excess Profits Taxes due for the calendar year 1917.

Statement of the Case.

The facts in this case as found by the Board of Tax Appeals appear at pages 40-46 of the record. The pertinent portions thereof may be summarized as follows:

The petitioner filed his 1917 income tax return on March 30, 1918. On February 5, 1921, he executed and filed a waiver extending indefinitely the period within which assessment of income taxes provided by the Revenue Act of 1916, as amended by the Act of October 3, 1917, could be made (R. 40). On March 3, 1924, petitioner executed and filed a consent in writing extending the period for both assessment and collection for one year from its date, or for one year from the expiration of the statutory period as extended by any other waiver on file (R. 41). On March 12, 1925, the Commissioner of Internal Revenue made a jeopardy assessment of taxes found to be due (R. 43).

Specification of Errors.

The Circuit Court of Appeals erred in its conclusions of law in this case as follows:

(1) In holding that the alleged assessment-only waiver of February 5, 1921, extended the period for collection of Income and War-Excess Profits Taxes for 1917.

(2) In holding that a waiver executed after the expiration of the statute of limitations can revive the right of the Commissioner to assess and collect Income and War Excess Profits Taxes.

ARGUMENT.

The order of this court granting the issuance of a writ of *certiorari* to review the determination of the Circuit Court of Appeals in this case limited the scope of the issues to be presented to the questions concerning the validity and effect of the waivers.

The Assessment-Only Waiver of February 5, 1921, Related Only to Income Taxes and Did Not Extend the Statutory Period for Collection Thereof.

The Income and War-Excess Tax Returns of this petitioner for the year 1917 were filed on March 30, 1918. On February 5, 1921, the petitioner signed and delivered to the Commissioner of Internal Revenue a so-called waiver (R. 40) which reads, as follows:

> WAIVER (Individual)
>
> "I, Friend M. Aiken, in consideration of the assurance given me by officials in the Income Tax Unit of the Bureau of Internal Revenue that my liability for all federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on my net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waive any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however. that I

do not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against me for said year by the officials of the Income Tax Unit.

Friend M. Aiken,
By (Signed) E. F. Blaise,
Attorney-in-Fact Taxpayer.

"Approved, D. H. Blair, Commissioner of Internal Revenue, Date—November 29, 1922."

It will be noted that this alleged waiver relates only to the time within which assessments may be made. It does not expressly or inferentially undertake to extend the limitation period for making collection. A careful reading of this instrument, also, will disclose that no mention is made of the War-Excess Profits Tax Act of October 3, 1917. Subsequent to the date this alleged waiver was delivered to the respondent the Revenue Act of November 23, 1921, was approved, which was the first Revenue Act providing for or authorizing the Commissioner to entertain or receive waivers. Section 250 (d) of that Act provides, as follows:

"* * * The amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled, 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax * * *."

The above statutory limitation with respect to this petitioner, expired without waiver on March 30, 1923. The tax in this case was not assessed until March 12, 1925. It is thus apparent that the Commissioner relied on the waiver of February 5, 1921, though it was not accepted by him until November 29, 1922. At the time when this waiver was requested by the Commissioner and submitted by this petitioner, there was no statutory provision for waivers and the respondent was without authority to demand, accept or consider such waiver until the enactment of the Revenue Act of 1921, on November 23, 1921. The duties of the Commissioner of Internal Revenue are defined and limited by statute and when he acts without statutory authority such acts are void (*Joy Floral Company* v. *Commissioner,* 29 Fed. (2d) 865). The Revenue Act of 1918 which was in effect at the time the waiver was demanded by the Commissioner and submitted by the petitioner did not contain, inferentially or otherwise, an authorization for a contract, consent or waiver of an extension of the statute of limitations. The 1918 and prior Revenue Acts created a certain liability and limited such liability on point of time in no uncertain terms, making no provision whatsoever authorizing anyone to waive the periods of time therein provided or consent to an extension thereof. It is true that the Revenue Act of 1921 contained a provision authorizing the Commissioner to enter into an agreement with a taxpayer to extend the statute of limitations provided by law for the determination, assessment and collection of the tax. However, there is nothing in the 1921 Act which purports to authorize and

validate an agreement to an extension of the statute of limitations for assessment only which was entered into prior to the enactment of that statute.

The honorable court, in a long line of decisions dealing with the general subject of the power of an authorized officer to bind the government, has accepted the principle of law that an authorized officer of the Government is a creature of statutory law and may only contract and bind the government to the extent, in the manner and for the purposes specifically authorized by such law. *Hunter* v. *United States*, 5 Peters 173; *Pierce* v. *United States*, 7 Wall. 666; *Coler* v. *Cleburne*, 131 U. S. 162. Further, this court has held in *De Arnand* v. *United States*, 151 U. S. 488, that an officer of the government has no authority to waive the statutory limitation imposed upon suits against the United States. In *Anthony* v. *Jasper County*, 101 U. S. 693, the court stated that a government agent's authority depended upon the law in effect at the time he acted, and that he had only such powers as specifically granted by law. It follows, therefore, that the act of the respondent in demanding the waiver of February 5, 1921, was beyond the scope of his statutory authority and the waiver was void from its inception.

The petitioner contends that section 250 (d) of the Act of 1921, superseded the waiver of February 5, 1921. (*Toxaway Mills* v. *United States*, 61 Ct. Cl. 363.) The general rule is that a waiver extends only to rights existing when it is made. (*Pence* v. *Langdon*, 99 U. S. 578, and *Bennecke* v. *Insurance Company*, 105 U. S. 355.) This section of the

1921 Act very specifically provides that the Commissioner and a taxpayer may "consent in writing to a later determination, assessment and collection of the tax." A mere consent to the assessment will not suffice and certainly is not a compliance with the statute. We think this is a fair interpretation of the clause and the one which must be accepted. This honorable court in *United States* v. *Updike, et al.*, 281 U. S. 489, stated that the rule is that taxing acts, including provisions of limitation embodied therein, must be construed liberally in favor of the taxpayer. Following the rule of these cases it appears that a consent authorized by the Act of 1921, is one given after its enactment. With the passage of the Act of November 23, 1921, the respondent had a year and four months within which to assess and collect a tax or to obtain a waiver in conformity with the provisions of this act. He did neither the one nor the other.

After the Revenue Act of 1921 had been in operation for some two years, the respondent awoke to the fact that it contained a limitation provision for the assessment and collection of 1917 taxes. However, on April 11, 1923, he found that the bar of the statute of limitation on assessment and collection of all taxes for the year 1917 had fallen. Yet on that date he attempted to lift the bar by the promulgation of Mimeograph 3085, reading as follows:

> "The form of waiver now in use extends the time in which assessments of 1917 income and excess-profits taxes may be made to one year from the date of signing by the taxpayer. Inasmuch as there are many waivers on file signed by the taxpayers containing no limita-

tion as to the time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1, 1924."

If it can be said that this ruling means anything at all, or has any force whatsoever, it must be confined to waivers executed after the date of the passage of the Revenue Act of 1921, and before the five-year period of limitations for the assessment and collection of taxes had expired. However, from its wording it attempts to deal only with assessment waivers, without limit, that were executed by taxpayers prior to the date of the passage of the Revenue Act of 1921. Therefore it contravenes the plain provision of that law, and is void *in toto*. The only effect this ruling can have, is an amendment to the provisions of section 250 (d) of the Revenue Act of 1921; and for it to have that effect, renders it utterly void. It is fallacious, as was the argument of the government in the *Bowers* case, and in effect the Supreme Court has adjudged it to be void.

If the waiver of February 5, 1921, can be said to have been alive, it must be held that it has the breath of life breathed into it by the Commisioner's *ex parte* ruling of April 11, 1923. There is no support for such a conclusion, and it would do violence to every known rule of statutory construction.

Instead of promulgating Mimeograph 3085, the Commissioner should have carried his troubles to Congress, which is the only body that can amend its own laws.

About the time the Commissioner discovered the necessity for the enlargement of the time for making assessment and collection of taxes for the year 1917, it was also discovered that there should be an enlargement of the time for making refunds under the provisions of section 252 of the Revenue Act of 1921, of taxes overpaid. On March 4, 1923 (42 Stat. 1504), Congress amended section 252 of the Revenue Act of 1921; and again on March 13, 1924 (43 Stat. 22), Congress amended section 252 of the Revenue Act of 1921.

It is true that Congress could have provided originally, in section 250 (d), or by subsequent amendment, that indefinite waivers of the limitation provision of the Revenue Act of 1917 would terminate on a definite date. But what was the necessity for such a specific provision when the limitation theretofore waived was enlarged from about March 15, 1921, to March 15, 1923? In the original draft of section 250 (d), Congress evidently thought such enlargement was ample; and if not, the taxpayer and the Commissioner, by written consent, could extend said time. It would have been unfair to the taxpayer for the Commissioner to have undertaken to obtain from Congress an amendment similar to the provisions of Mimeograph 3085. It is doubtful that he could have obtained such an amendment, and certainly he may not make it himself.

A statute of limitation in the case of the Revenue Laws is provided solely for the benefit of taxpayers. A taxpayer who has the right to plead and rely upon the bar of the limitations prescribed by Congress for his sole benefit may not

be defeated in that right by a ruling of the Commissioner that is clearly beyond the scope of his authority and has no support in law.

In *Toxaway Mills* v. *United States*, 61 Court of Claims 363, at page 370, the court said:

> "We think the plaintiff could waive a right given by the statute. See *Shutte* v. *Thompson*, 15 Wall. 151, 159, and that it did so when it executed the waiver. But it does not follow that the waiver, standing alone, should be given the effect of waiving the provisions of a subsequent statute. The general rule is that a waiver extends the rights existing when it is made. See *Pence* v. *Langdon*, 99 U. S. 578, 581; *Bennecke* v. *Insurance Co.*, 105 U. S. 355, 359. In this view a consent authorized by the Act of 1921 is one given after its enactment."

In *Pence* v. *Langdon*, 99 U. S. 578-582, it is said:

> "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. * * * There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do."

In *Bennecke* v. *Connecticut Mutual Life Insurance Company*, 105 U. S. 355, at page 360, it is said:

> "A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally but with knowledge of the circumstances. This is the rule where there is a direct and precise agreement to waive the stipulation. *A fortiori* is the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce a waiver

> from the conduct of the party. Thus, where a written agreement exists and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding."

It appears that the Commissioner of Internal Revenue approved the waiver of February 5, 1921, on or about November 29, 1922. Between the dates of February 5, 1921, and November 29, 1922, the subject-matter of the waiver in existence as of February 5, 1921, *viz,* the limitation provisions of the Revenue Act of 1917, had been repealed and entirely new litigation provisions prescribed. The taxpayer was never requested to give a waiver of the new limitations, and the approval by the Commissioner on November 29, 1922, of the taxpayer's waiver of the provisions of the 1917 Act did not convert said waiver into a consent provided for in section 250 (d) of the Revenue Act of 1921. In fact, its terms do not cover a waiver of the limitations provided in section 250 (d). It is true, that at the time the Commissioner approved said waiver as of November 29, 1922, he had the authority to make an assessment of tax against the taxpayer for the year 1917; but he had no authority to make a waiver for the taxpayer that would deprive him of the benefit of the limitation provisions expressly provided for his benefit. The taxpayer may not be held responsible to the government for the non-action or misconduct of the Commissioner. The Commissioner was supposed to know that the waiver of February 5, 1921, had been superseded by the

provisions of section 250 (d). The taxpayer never knew that the Commissioner had attempted to change the arrangements provided for in said waiver, until long after the bar of the limitations, as prescribed by section 250 (d), was down. However, the taxpayer did know, and was bound to know, that the limitation for assessment in the Revenue Act of 1917, that he waived, had been repealed; and that section 250 (d) of the Revenue Act of 1921 provided that no assessment of taxes would or could be made against him without deliberate, intensive and thorough consideration by the Commissioner, and that all taxes due from him for the year 1927 would become barred of collection on April 1, 1923.

As an interpretation of section 250 (d) of the Revenue Act of 1921, Mimeograph 3085 flies in the face of the decision of this honorable court in the *Bowers* v. *New York and Albany Lighterage* case, *supra*, and must fall.

As an amendment to section 250 (d) of the Revenue Act of 1921, Mimeograph 3085 undertakes to provide that, where a waiver of the limitation provisions of section 9 of the Revenue Act of 1917 was given, the limitation provisions of section 250 (d) do not become operative, and that any time before April 1, 1924, any tax found to be due for the year 1917 could be assessed and collected as though the Revenue Act of 1921 had never been passed. That after the tax was assessed, if assessed before April 1, 1924, it could be collected by distraint proceedings at any time. In other words, the Commissioner holds that the taxpayers who executed waivers prior to November 23, 1921, had waived the

benefit of all future laws in regard to having their tax matters settled except as he might determine.

In *Bowers, Collector,* v. *New York and Albany Lighterage Company,* 273 U. S. 346, this court held that the government was barred from collection after the five-year period, even though assessment had been made during the authorized period. It follows, therefore, that although this court should hold that assessment was made under the authority granted by the assessment-only waiver which was unlimited as to time, the period for collection was limited to the statutory provisions and collection was barred after March 30, 1923. We want to urge that the alleged waiver of February 5, 1921, is not such a consent or agreement as is contemplated by section 250 (d) of the Revenue Act of 1921. The weight and consideration to be given the instrument is to be gathered from the language employed. The instrument relates only to assessment and since the language is clear and unambiguous we submit that it does not meet the requirements of section 250 (d) of the 1921 Act, which authorizes a consent to a later determination, assessment and collection of the tax. In this connection may we urge that this court in *Bowers* v. *New York and Albany Lighterage Company, supra,* and again in the *Benjamin Russell* case, 278 U. S. 181, has recognized that the power to assess and the power to collect are separate and distinct powers which are separately and independently provided for by law. This court in those cases held that the power to collect is not one of the incidents of the assessment. These cases, therefore, hold that a waiver of the statutory period for making the

assessment does not constitute a waiver of the statutory period for collection unless the waiver of the period for collection is expressly included.

Granting, for the purpose of this discussion, that the waiver of February 5, 1921, was a valid instrument to the extent of its express terms, it did not operate to extend the period of assessment and/or collection of the taxes imposed by the War-Excess Profits Tax Act of October 3, 1917. This waiver expressly states "* * * for all federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by Act of Congress, approved October 3, 1917, * * *." On October 3, 1917, an amendment to the Act of September 8, 1916, was approved. On the same date the War-Excess Profits Tax Act was approved. This latter act is in no sense an amendment to the Act of September 8, 1916. It is unreasonable to urge that the language quoted above from the waiver of February 5, 1921, includes taxes imposed by the War-Excess Profits Tax Act.

In this connection, we wish to call the court's attention to the fact that the form of the alleged waiver here under consideration is that form drawn and prepared by the Commissioner and furnished to the petitioner by that official. This fact alone should preclude constructions and interpretations of a strained or inferential character, particularly where the same tend to favor the Commissioner. The fair and reasonable import of the language used in the waiver form circumscribed its significance. An extension beyond this by interpretation or otherwise, is wholly unwarranted. The taxpayer's contention with respect to the interpreta-

tion to be given this waiver, if valid for any purpose, is fully sustained by the court in *Joy Floral Company* v. *Commissioner, supra*, and certainly cannot be interpreted in a manner to extend the statute of limitations for assessment of taxes imposed by the War-Excess Profits Tax Act of October 3, 1917.

This court has held in *Florsheim Brothers Dry Goods Company, Ltd., et al.*, v. *The United States*, 280 U. S. 453, that a waiver of the statute of limitations is nothing more than what it is termed on its face—waiver. This being true, the petitioner earnestly contends that the instrument of February 5, 1921, even if found to be valid for any purpose whatsoever, merely gave the Commissioner the right to assess a tax due under the taxing statute specifically mentioned in such instrument; that no right is thereby given to collect such tax in a manner and at a time not provided by the statute under which the tax is due and assessable and that the collection of such tax has been barred since April 1, 1923; that no right whatsoever is thereby given to assess and/or collect a tax due and assessable under the War-Excess Profits Tax Act of October 3, 1917, in a manner and at a time not provided by such act or by subsequent Revenue Acts and that the assessment and/or collection of such tax has been barred since April 1, 1923.

A Waiver Given After the Expiration of the Statutory Period for Assessment and Collection Is Invalid.

After the alleged assessment-only waiver of February 5, 1921, was filed and the Commissioner of Internal Revenue had promulgated Mimeograph 3085, nothing further to revive the statute of limitations was done until the assessment and collection waiver dated March 3, 1924, was demanded and filed (R. 41). This waiver purported to extend the statutory period for one year from the date it was signed, or the statutory period as extended by any waivers already on file with the Bureau of Internal Revenue.

The petitioner earnestly contends that the assessment and collection waiver filed on March 3, 1924, was filed after the statute of limitations had expired and on that account was null and void. The United States Court of Claims in the case of *Chas. H. Stange* v. *The United States*, decided November 4, 1929, held that there was no material difference between the provisions of the Revenue Act of 1921 and 1924, as the same related to the provisions for waivers of the periods of limitation. The Court of Appeals for the District of Columbia, in the case of *Joy Floral Company* v. *Commissioner*, 29 Fed. (2d) 865, had before it the question of the validity of a waiver given after the enactment of the Revenue Act of 1924. The court in that opinion stated:

> "When Congress enacted the Revenue Act of 1924, which also is applicable to this assessment, it added the proviso contained in section 278 (c), *supra*, to the effect that if both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the expiration of the time prescribed in section

277 for its assessment, the tax may be assessed at any time prior to the expiration of the extended period thus agreed upon. The question arises whether the words 'have consented to the assessment,' relate only to an agreement made prior to the expiration of the five-year period for the purpose of extending the period, or whether they relate also to an agreement made after such period has expired, for the purpose of reviving the Commissioner's authority to make an assessment after the bar of the statute has already intervened.

"The Board of Tax Appeals held that the consent thus filed after the lapse of the five-year period was valid and effective, and accordingly sustained the assessment. We are of the opinion, however, that the board erred in so ruling."

In *Spear & Company* v. *Heiner*, 34 Fed. (2d) 795, the District Court for the Western District of Pennsylvania held that a waiver executed after the statute has run to be effective, must be supported by a consideration and that the tax collected on the theory that the waiver was valid, was unlawful and plaintiff entitled to recover. The same question has been considered by other courts and in the following cases the waivers were held invalid:

Columbian Iron Works v. *Lee Brock, Collector*, (U. S. District Court for the Middle District of Tennessee, September 28, 1929);

Walsh v. *Price*, 34 Fed. (2d) 57;

Graylock Mills v. *The Commissioner*, 31 Fed. (2d) 655 (Circuit Court of Appeals for the 2nd Circuit);

Pictorial Printing Company v. *The Commissioner*, 38 Fed. (2d) 563.

In the last mentioned case *(Pictorial Printing Company)*, the Circuit Court stated:

"* * * Concededly the right to take proceedings for the determination, assessment, and collection of appellant's 1916 tax terminated February 28, 1922, and when a year and a half thereafter, the revenue officers appeared at appellant's place of business to investigate that return, there was no longer any right to institute any proceedings looking to the determination, levy or collection of any further tax for that year.

"When the revenue officer then presented the waiver or consent for signature, the taxpayer has no liability on account of the tax for 1916 * * *.

"But, apart from this, there is the question whether, in general, a statutory consent for determination of a tax, entered into after expiration of the period of limitation, upon proceedings for redetermination, assessment, or collection, has any validity.

"The Board of Tax Appeals held in its opinion in this case that such a consent was binding upon the taxpayer, and that a deficiency found thereunder was valid and collectable. Among others of the Board's opinions there was cited in support *Joy Floral Company*, 7 B. T. A. 800. It appears that upon review of that case by the Court of Appeals of the District of Columbia, that court reversed the decision of the Board, and held that such consent for extension was not effective if entered into after the period of limitation had expired. *Joy Floral Company* v. *Commissioner*, 29 F. (2d) 865. This decision was followed in *Spears & Company* v. *Heiner, Collector*, D. C. Pa., 34 F. (2d) 795; and by the District Court for the Middle District of Tennessee in *Columbia Iron Works* v. *Brock, Collector*, September 28, 1929. But in a more recent case, in the United States Court of Claims, *Stange* v. *United States*, November 4, 1929,

a decision was reached in conformity with the views of the Board of Tax Appeals in its *Joy Floral Company* decision.

"For the reasons stated in the said opinion of the Court of Appeals of the District of Columbia, and in the above cited cases in which it was followed, we are of the opinion that the correct rule was there announced, and that the Commissioner takes nothing by a consent first entered into after the limitation had expired."

A limited period for assessing and collecting taxes imposed a limitation upon the power of the administrative officers of the government. Those officers are creatures of the statute and after the expiration of the statutory period their acts are without legal effect and are therefore void. The subject-matter here involved is one relating to the exercise of a sovereign power of taxation, a matter charged with a public interest. This case is one wholly different from that which might arise on a limitation statute which is to be waived or invoked by one private citizen against another. If we assume the parties to be *sui juris,* then only private rights are involved and the statute of limitations or even laches may be waived at any time by the party sought to be charged. In that sort of case the public has no concern, no precedent is established which may affect the public in general, such as we have where there is a question of the revival of the power of a public officer, previously barred, to levy or collect a tax.

The petitioner concedes that the Constitution confers upon Congress the power to levy and collect taxes and that

the Congress may extend the period for the levy and collection of those taxes. However, that question is not involved in the consideration of this case. Here we are concerned with the question involving the proper construction of a taxing act; and the revival of a taxing power in the Commissioner of Internal Revenue such as is here contended for by the government must be evidenced by language that is susceptible of no other reasonable construction. We submit that the provisions of section 250 (d) of the Revenue Act of 1921 do not meet that test. Undoubtedly the government's position must be sustained by the provisions of the above mentioned section and by the alleged waiver which the respondent is contending was executed in conformity with that section.

The petitioner submits that the waiver of March 3, 1924, if valid at all, did not extend the period for collection beyond March 30, 1924. The five-year period provided by section 250 (d) of the Revenue Act of 1921, with respect to the 1917 returns filed on March 30, 1918, had expired on March 30, 1923. However, if this court should hold that the waiver was valid from the date filed, then by its terms it would expire on March 3, 1925, and the Commissioner has been without authority to assess and to collect the 1917 taxes since that date. Furthermore, if this court should hold that the waiver of March 3, 1924, was signed during the period of the alleged assessment-only waiver of February 5, 1921, the facts show that the said waiver of March 3, 1924, was signed after the period of collection of the taxes imposed by the Revenue Act of September 8, 1916, as amend-

ed on October 3, 1917, has expired. In our discussion of the first issue included in this brief it was pointed out that the alleged assessment-only waiver of February 5, 1921, made no reference whatsoever to the taxes assessable for the year 1917, under the provisions of the War-Excess Profits Tax Act of October 3, 1917. We also pointed out that since no reference was made to that act in the alleged assessment-only waiver of February 5, 1921, the periods of limitation for assessment and collection of the War-Excess Profits Taxes which might be determined to be due from this petitioner expired on March 30, 1923. The waiver of March 3, 1924, purported to waive and extend the statutes of limitation for assessment and collection of the War-Excess Profits Taxes but such waiver was demanded by the respondent and filed by the petitioner after the statute of limitations had run, and under authority of the *Joy Floral Company* and *Pictorial Printing Company* cases, *supra,* is void and of no effect for any purpose whatsoever. This position is also sustained by the *dictum* appearing in the *Graylock Mills* case, *supra.*

This petitioner earnestly contends that there is no provision in any of the revenue acts which authorizes the reinstatement of the statutory periods of limitation after such periods have run or expired. It also appears that a revival of such statutory periods has at no time been contemplated by the Congress. At least there is nothing in the various revenue acts which would suggest anything of this sort. The only reasonable construction which may be given the pertinent provisions of the Revenue Act of 1921, and subse-

quent revenue acts relating to extension of the periods of limitation undoubtedly contemplate a consent or agreement by the Commissioner and the taxpayer to a continuation or extension of a right that in fact exists at the time the consent or agreement is entered into or made.

For these reasons it is respectfully urged that the waiver filed with the Commissioner on March 3, 1924, and the waiver filed on February 16, 1925, (R. 39) did not revive or reinstate the statutory periods of limitation, either with respect to assessment or with respect to collection.

It is submitted that the assessment of the additional tax here involved was made at a time when there were no valid waivers on file and the waiver relied upon at the time the assessment was entered was void because it was executed and filed after the expiration of the statutory periods for assessment and collection. Especially does the petitioner again urge that the assessment and collection of the War-Excess Profits Taxes sought to be collected from this petitioner has been barred of both assessment and collection since March 30, 1923.

Conclusion.

The judgment of the Circuit Court of Appeals for the Eighth Circuit entered in this case should be reversed and the relief prayed for by the petitioner granted.

Respectfully submitted,

JAMES H. MAXEY,
Counsel for Petitioner.

L. E. CAHILL,
W. LEO AUSTIN,
Of Counsel.

APPENDIX.

The following provisions of law are pertinent to the consideration of this appeal:

REVENUE ACT OF 1913, SECTION E *(1)*.
REVENUE ACT OF 1916, SECTION 9-*a*.
REVENUE ACT OF 1917, SECTION 14-*a*.

"That all assessments shall be made by the Commissioner * * * and all persons shall be notified of the amount for which they are respectfully liable on or before the 1st day of June of each successive year * * * except in cases of refusal or neglect to make such return and in cases of erroneous, false, or fraudulent returns, in which cases the Commissioner * * * shall, upon the discovery thereof, at any time within three years after said return is due, or has been made, make a return upon the information obtained * * * and the assessment * * * thereon shall be paid * * * immediately upon notification of the amount of such assessment * * *."

REVENUE ACT OF 1918, SECTION 250-*d*.

"* * * The amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made * * *."

REVENUE ACT OF 1921, SECTION 250-*d*.
(42 Stats. 265-266.)

"The amount of * * * any * * * taxes due under this act for prior taxable years * * * shall be deter-

mined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax; and no suit for the collection of any such taxes * * * shall be begun after the expiration of five years after the date when such return was filed * * *."

REVENUE ACT OF 1924, SECTION 277-*a*-2.
(43 Stats. 299-300.)

"The amount of * * * taxes imposed by the * * * Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

SECTION 278.

"*(c)* Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

"*(d)* Where the assessment * * * is made within the period prescribed in section 277 * * * such tax may be collected by distraint or by a proceeding in court * * * begun within six years after the assessment of the tax. Nothing in this act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

"*(e)* This section shall not *(1)* authorize the assessment of a tax or the collection thereof by distraint

or by a proceeding in court if at the time of the enactment of this act such assessment, distraint or proceeding was barred by the period of limitation then in existence, or *(2)* affect any assessment made, or distraint or proceeding in court begun, before the enactment of this act."

REVENUE ACT OF 1926, SECTION 277 *(a)*.
(44 Stat. 58-59.)

Section 277 *(a)*, except as provided in section 278:

"*(3)* The amount of income, excess profits, and war profits taxes imposed by the act entitled, 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the act entitled, 'An act to reduce tariff duties and to provide revenue for the government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

"* * * Sec. 278 *(c)*. Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

SECTION 1106 *(a)*.

"The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy, but shall extinguish the liability * * *."

[APPENDIX]

REVENUE ACT OF 1928, SECTION 276-*b*.

"*Waivers.* Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreement in writing made before the expiration of the period previously agreed upon."

Office Supreme C
FILED
APR 19
CHARLES

FILE COPY

No. ~~777~~ 69

In the Supreme Court of the United States

OCTOBER TERM, 1929

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 777

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the granting of the writ in this case.

The petition for certiorari presents two questions which are now before this Court in *Charles H. Stange* v. *The United States,* No. 554, October Term, 1929, writ of certiorari granted March 3, 1930.

The first question is whether a "consent in writing" waiving the period of limitations for the collection of taxes is valid and effective within the